Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS.

On Petition for a Writ of Certiorari to the Commonwealth of Massachusetts Appeals Court

PETITION FOR WRIT OF CERTIORARI

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
John Bronsteen
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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QUESTION PRESENTED

The Bankruptcy Code provides that "a plan [of reorganization] may * * * provide for * * * the retention and enforcement by the debtor * * * of any * * * claim or interest * * * belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3).

The question presented is whether, notwithstanding 11 U.S.C. 1123(b)(3), a bankruptcy confirmation extinguishes a debtor's claims against a creditor despite the facts that (a) the plan of reorganization expressly preserves the debtor's right to pursue all claims he may have against that creditor, and (b) the creditor is indisputably aware that the claims have been preserved.

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bahig Bishay respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Appeals Court in this case.

OPINIONS BELOW

The opinion of the Massachusetts Appeals Court (Pet. App. 1a-10a) is available at 2002 WL 31375621. The opinion of the Massachusetts Superior Court (Pet. App. 11a-34a) is available at 1997 WL 785596.

JURISDICTION

The Massachusetts Supreme Court denied a timely request for further appellate review (Pet. App. 35a) on January 7, 2003. This Court has jurisdiction under 28 U.S.C. 1257

RELEVANT STATUTORY PROVISIONS

11 U.S.C. 1123(b)(3) provides in relevant part:

[A] plan may * * * provide for –

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest.

STATEMENT OF THE CASE

A debtor who files for Chapter 11 bankruptcy notifies his creditors and the bankruptcy court of all assets he owns, including any lawsuits he may file against his creditors. See, *e.g.*, *Oneida Motor Freight, Inc.* v. *United Jersey Bank*, 848 F.2d 414, 416 (CA3 1988). When the bankruptcy court confirms a plan of reorganization, the order of confirmation is a binding judgment that, by default, is *res judicata* with respect to claims between the debtor and the creditors. See,

e.g., *Katchen* v. *Landy*, 382 U.S. 323, 334 (1966). In some cases, litigating all such claims in the bankruptcy court would take years. In order to expedite the process of Chapter 11 reorganization, Congress accordingly enacted a statute permitting a debtor to reserve his claims for litigation after the bankruptcy plan is confirmed: "[A] plan may * * * provide for * * * the retention and enforcement by the debtor * * * of any * * * claim or interest * * * belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3)(B). In this case, the creditor (Citizens Bank) itself drafted the plan's reservation clause: "The Debtors' estates may retain and, by [their] duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')." The bankruptcy court approved the plan, including the reservation clause, and ordered the debtor (petitioner Bishay) to post $500,000 as security for costs Citizens might incur in defending against those claims. The Massachusetts Appeals Court nonetheless held that the confirmation of the plan extinguished all claims Bishay filed thereafter. Pet. App. 4a-5a & n.5.[1]

The lower court's ruling exemplifies the sharp conflict over whether a Chapter 11 debtor can preserve his right to bring *all* claims against a creditor by including in the reorganization plan a clause to that effect. The Massachusetts Appeals Court's *per se* rule in this case — holding that a debtor may preserve only those claims that he names specifically in the plan — has been adopted by the Sixth and Seventh Circuits. By contrast, the Eighth Circuit and the Supreme Courts of Virginia, Alaska, and Louisiana have

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[1] As the Massachusetts Superior Court acknowledged, "[t]he res judicata effect of an order of a bankruptcy court, a federal tribunal, is governed by federal preclusion principles." Pet. App. 22a n.21. The *res judicata* effect of the bankruptcy court's confirmation order was the principal subject of the litigation in the Massachusetts state courts in this case.

opted instead for an intermediate approach, enforcing a clause that reserves all claims if the creditor is aware that claims against it are preserved. A third group of courts has interpreted Section 1123(b)(3) to embody the opposite *per se* rule from the one applied below – *i.e.*, as *authorizing* a debtor to preserve all claims simply by inserting a "blanket" reservation clause into the plan. This Court's intervention is needed to resolve the conflict and to correct the harmful mistaken interpretation of Section 1123(b)(3) that potentially affects any Chapter 11 bankruptcy.

1. Petitioner Bahig Bishay owns a business in East Walpole, Massachusetts that sells, leases, and services luxury cars. In 1988, Bishay borrowed for his business $2,560,000 from Neworld Bank; and from 1989 through 1994, Bishay entered into a series of agreements with Neworld regarding the timing for repaying the loan. Pet App. 11a-15a. Respondent Citizens Bank bought Neworld in April 1994 and immediately changed the course of dealing with Bishay. Citizens wrongly denied that Bishay had repaid any of the principal on the loan, when in fact he had repaid $300,000. The bank also used private information it learned from Bishay to try to acquire for itself a property about which Bishay was negotiating with the FDIC. When Citizens' actions prevented Bishay from meeting his loan repayment schedule (*e.g.*, by making it extremely difficult for him to receive financing from other sources), Citizens sued Bishay for breach of contract in Massachusetts Superior Court in June 1995. Bishay filed an answer containing a counterclaim that alleged (1) a breach by Citizens of its duty of good faith and fair dealing, and (2) unfair trade practices by Citizens under Massachusetts General Laws Chapter 93A. Pet. App. 19a.

Although Bishay was willing and able to pay his creditors — indeed, he repaid *every* creditor *in full* — he was compelled to file for Chapter 11 bankruptcy to protect himself against the actions of Citizens that were preventing him from running his business. See Pet. App. 19a-20a. Bishay tried to pay Citizens in full, but Citizens refused the offer of full

payment, demanding that Bishay also release all of his claims against Citizens. Bishay refused the demand, and in October 1995 he gave Citizens a list of additional claims that he intended to pursue against the bank and notified Citizens that he would amend his previously filed counterclaims to include the additional claims.

Citizens filed a third-party plan of reorganization in the Bishay Chapter 11 proceeding. See Pet. App. 20a. This plan initially sought to extinguish Bishay's claims against the bank by providing that Citizens would pay Bishay $10 in return for the release of "all claims." The Chapter 11 Trustee informed Citizens of his intention to oppose the plan on the ground that its failure to preserve those litigation rights made the plan unconfirmable. In response, Citizens modified its proposed plan by replacing the claim-extinguishing clause with the claim-preserving clause at the heart of this case: "The Debtors' estates may retain and, by [their] duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')." On July 31, 1996, the bankruptcy court issued an order appointing Bishay as the "authorized representative" of his estate.

Neither the plan of reorganization nor the order of confirmation determined the extent to which Bishay's debt to Citizens was enforceable. To the contrary, the plan – which, as noted, Citizens itself had drafted – required Bishay to pay the debt to Citizens only "until and unless" those obligations were reduced by an offsetting judgment obtained by Bishay against Citizens in the pending state court litigation. The plan accordingly characterized Citizens' claims against Bishay as "impaired," whereas it characterized the claims of all other creditors as "unimpaired." Citizens further acknowledged Bishay's preserved claims by demanding that the bankruptcy court require Bishay to post the extraordinary sum of *$500,000* as security for the costs Citizens might incur in defending itself against those claims. In its request, Citizens

referred specifically to Bishay's itemized list of claims and described the claims as "wide-ranging." The bank also acknowledged these claims, and petitioner's retention of them, in its Disclosure Statement.

The bankruptcy court approved Citizens' proposed plan on April 23, 1996. Pet. App. 20a. The confirmed plan reserved Bishay's right to "prosecute [his] alleged claims against Citizens" on the condition that Bishay post the $500,000 as security for Citizens' defense of those claims. Bishay complied with the order by posting the $500,000.

2. In June 1996, Citizens filed a motion in Massachusetts Superior Court for summary judgment with respect to Bishay's two-count counterclaim; and Bishay moved to amend his answer and counterclaim. The court granted Bishay's request, and it denied Citizens' motion "without prejudice to renew it as to the amended answer and counterclaim." Pet. App. 21a. Bishay accordingly amended his counterclaim to include six counts, all of which were on the list that he had sent Citizens in October 1995: the two original counts, along with promissory estoppel, intentional interference with contractual and advantageous relations, request for declaratory relief with respect to the validity of a Forbearance Agreement, and intentional infliction of emotional distress. *Id.*

Citizens then moved for summary judgment with respect to the four counterclaims that had not been contained in Bishay's original answer, arguing that those counterclaims were barred by the doctrine of *res judicata*. Pet App. 21a. Bishay responded that the plan expressly reserves his claims and orders him to pay Citizens only "unless and until" Bishay obtains a favorable judgment against the bank in the state court litigation.

The Superior Court rejected Bishay's argument. Pet. App. 26a. The court took the position that "any reservation of a debtor's right to pursue rights and remedies outside of the bankruptcy proceeding must *specifically identify the cause of*

action reserved." *Id.* at 24a (emphasis added); see also *id.* at 26a (requiring "express and specific identification of the individual causes of action reserved"). In the Superior Court's view, "a blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan." *Id.* (quoting *D&K Props. Crystal Lake* v. *Mut. Life Ins. Co.*, 112 F.3d 257, 261 (CA7 1997)).

Applying this principle, the court ruled that "[t]he language of the reservation in the reorganization plan is far too broad and vague to prevent the Confirmation Order from constituting *res judicata.*" Pet. App. 26a. The court opined that the clause was particularly problematic with respect to three of the four counts at issue – the three counts that "are in the nature of defenses to Bishay's obligation to repay the debt owing to Citizens" and that thus "seek to litigate the validity of the Note and Forbearance Agreement" that, according to the Superior Court, "the Bankruptcy Court necessarily determined * * * were valid and enforceable" when it "order[ed] Bishay * * * to repay the obligation incurred pursuant to" those agreements. *Id.* at 27a.

3. Bishay appealed to the Massachusetts Appeals Court, which affirmed. Pet. App. 1a-10a. The court adopted the reasoning of the Superior Court:

> There is no merit in Bishay's argument that general or blanket type language in the reservation clause preserved his claims in the amended counterclaim. "A blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan."

Id. at 4a n.6 (quoting *D&K*, 112 F.3d at 261).

4. The Massachusetts Supreme Judicial Court denied Bishay's request for discretionary review. Pet. App. 35a. This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

The Massachusetts Appeals Court violated 11 U.S.C. 1123(b)(3)(B) by adopting a *per se* rule against enforcing any clause, in a Chapter 11 plan, that reserves all of a debtor's claims against a particular creditor. The decision below not only reads Section 1123(b)(3)(B) out of the Bankruptcy Code but also reads the reservation clause out of the confirmed plan. In this case, the rule worked a particularly manifest injustice because the creditor itself had drafted the clause and was acutely aware of Bishay's intention to pursue claims he had not yet filed. Moreover, the rule destroys the purpose for which Section 1123(b)(3)(B) was enacted, because it forces debtors to prolong federal bankruptcy proceedings – sometimes for years – while all claims are litigated before the bankruptcy court. The decision also deepens an entrenched three-way conflict among the courts, siding with the Sixth and Seventh Circuits but against (*inter alia*) the Eighth Circuit and the Supreme Courts of Virginia, Alaska, and Louisiana.

I. Certiorari is warranted because the Massachusetts Appeals Court's *per se* rule against enforcing clauses that reserve all claims is wrong.

A. The doctrinal and policy problems created by the Appeals Court's rule are legion. "The Code, the better-reasoned case law, and equitable considerations support giving effect to a plan provision containing a general reservation." *In re Weidel*, 208 B.R. 848, 853 (Bankr. M.D.N.C. 1997).

First, the decision below contradicts the express command of Congress that "a plan may * * * provide for * * * the retention and enforcement by the debtor * * * of any * * * claim or interest * * * belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3). "[T]here is nothing in the

provision to suggest that the plan must specifically identify each and every claim and/or interest belonging to the debtor that may be subject to retention and enforcement." *Cohen* v. *TIC Fin. Sys.*, 279 B.R. 145, 158 (Bankr. D. Del. 2002). Neither the Appeals Court nor any other court has pointed to any language in the statute or in its legislative history justifying a *per se* rule that a claim may be preserved only if it is identified specifically. To the contrary, the legislative history of Section 1123(b)(3) mirrors the statute itself in contemplating the retention of claims after plan confirmation: "The plan may also provide for the treatment of claims by the debtor against other entities that are not settled before the confirmation of the plan." H.R. REP. NO. 95-595, at 406-07 (1977).

Second, the Appeals Court violated a core principle of contract interpretation. "Because a [bankruptcy] plan is often more akin to a contract than a disputed order, general contract principles ought to be applied to its interpretation." *UNR Indus., Inc.* v. *Bloomington Factory Workers*, 173 B.R. 149, 157 (Bankr. N.D. Ill. 1994); see also *Cohen*, 279 B.R. at 160; *Peltz* v. *Worldnet Corp.*, 280 B.R. 573, 592 (D. Del. 2002). This Court has recognized the "cardinal principle of contract construction" that "a document should be read to give effect to all its provisions." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). The Appeals Court violated this rule by reading the reservation clause out of the contract entirely.

Third, the Appeals Court violated "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono*, 514 U.S. at 62. Bishay's reservation clause is clear and unambiguous; but even if it were not, its ambiguities should be resolved against the drafter — Citizens. In *Peltz*, the court enforced such a clause because, *inter alia*, "[p]rior to a plan's confirmation, creditors have the opportunity to examine the terms of the proposed plan and respond accordingly." 280 B.R. at 592. In *Bishay*,

the argument for giving effect to the clause is even stronger because Citizens actually drafted it.

The ruling of the Appeals Court is all the more difficult to justify in light of the fact that Citizens itself viewed the clause as preserving all of Bishay's claims. Citizens left the clause out of the plan it proposed initially, but "the Chapter 11 Trustee [would] not support [that] plan because * * * he believe[d] it's unconfirmable due to the treatment of Bishay's claims against Citizens (i.e. they are extinguished)." Memo of R.M. Barry to Citizens Bank of 3/13/96, at 3. Fearing that if "the Trustee oppose[d] Citizens' plan, it might be difficult for the judge to confirm the plan," Citizens concluded that it "shouldn't jeopardize confirmation of our plan over the settlement of Bishay's claims." *Id.* at 3-4. Citizens thus understood perfectly that the modified plan it submitted would leave the bank "defending against Bishay's claims." *Id.* at 4. The bank acknowledged in its Disclosure Statement that those claims included the ones on the comprehensive itemized list that Bishay had given Citizens in October 1995. Indeed, the bankruptcy court ordered Bishay to post $500,000 as security for costs Citizens might incur in defending against Bishay's claims.[2] Citizens included the reservation clause as part of the typical strategic decisionmaking or bargained-for exchange that is characteristic of contract formation. The Appeals Court unjustifiably interfered with that process to protect a party that needed no protection — the creditor/drafter.

The lone justification offered by the Appeals Court for its decision — *viz.*, that giving effect to a general reservation clause "would eviscerate the finality of a bankruptcy plan" (Pet. App. 4a n.6 (quoting *D&K*, 112 F.3d at 261)) — is

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[2] The Massachusetts Superior and Appeals Courts inexplicably awarded $430,000 out of the $500,000 to Citizens while prohibiting Bishay from bringing the very claims for which the money was earmarked as a defense fund.

without merit. The finality of a plan is undermined no more by a reservation clause preserving all claims against a particular creditor than by a clause reserving specific claims. In this case, Citizens knew precisely which claims Bishay intended to make, because he had notified the bank of those very claims in his letter of October 1995 (containing the itemized list of claims). Citizens convinced the bankruptcy court to order Bishay to set aside $500,000 for Citizens' legal fees in defending those claims. Citizens thus knew, at the time the bankruptcy plan was confirmed, precisely the litigation prospects it faced — just as it would have if the reservation clause had listed specific claims. This set of circumstances occurs often in cases involving general reservation clauses: The creditor understands the scope of the claims it faces because it is intimately familiar with the details of its own conduct.

In addition, the adoption of the *per se* rule by the courts below cannot be squared with the Superior Court's decision, endorsed by the Appeals Court (Pet. App. 3a), to permit Bishay's two pre-confirmation counts to go forward. Even if those two claims were "independent claims which could be characterized as a set-off to Bishay's debt" whereas the four later claims were "in the nature of defenses to Bishay's obligations under the note" (*id.*), that distinction is irrelevant. Both state courts below took the position that "[t]he application of res judicata to a bankruptcy court order confirming a Chapter 11 reorganization plan generally bars later proceedings on *all claims and issues concerning the debtor-creditor relationship* that were actually raised during the confirmation process *as well as those that could have been raised.*" Pet. App. 2a (emphasis added) (alteration omitted). Bishay's two pre-confirmation claims clearly "concern[ed] the debtor-creditor relationship" and "could have been raised" before the bankruptcy court. Had the Superior Court and Appeals Court actually believed the logic behind their own rule, they would have deemed *all* of Bishay's six claims to be barred by *res judicata.*

Finally, there is no merit in the Appeals Court's suggestion that the four counts Bishay added to his counterclaim after confirmation were necessarily adjudicated by the bankruptcy court's order. See Pet. App. 3a-5a; see also *id.* at 27a. The bankruptcy court provided precisely the opposite. The plan that the bankruptcy court confirmed characterized Citizens' claims against Bishay as "impaired" by Bishay's reserved claims and decreed that Bishay had to pay Citizens only "until and unless" his obligations were reduced by an offsetting judgment against Citizens in the pending state court litigation. Even the Massachusetts Superior Court acknowledged that the bankruptcy court had issued an order appointing Bishay as representative of the debtor's estate so as to permit him to "pursue the present litigation." Pet App. 26a n.21. Neither Citizens nor the Massachusetts courts can offer any explanation why the bankruptcy court would order Bishay to set aside $500,000 for Citizens' defense costs if that court believed the bank would have to defend only the two pre-confirmation counts of Bishay's counterclaim.

B. The question presented is vital to the orderly administration of the bankruptcy system. "Obviously, if it is necessary to identify completely and disclose the intent with regard to each avoidance action in order to preserve it properly, then the Bankruptcy Code's goal of a quick and orderly confirmation may be substantially derailed." C. Wesley Vines and Vernon O. Teofan, *The Preservation and Prosecution of Avoidance Actions Post-Confirmation*, 12 BANKR. DEV. J. 735 (1996). The reason is that "the confirmation process is expedited by allowing debtors to include a general reservation of their right to pursue certain causes of action at a later date." *Cohen*, 279 B.R. at 159; see also *In re Weidel*, 208 B.R. 848, 853 (Bankr. M.D.N.C. 1997). The federal bankruptcy court in *Cohen* gave a detailed explanation of the problem:

> [I]n large chapter 11 cases, the investigation and litigation of all possible avoidance actions to final

> judgment can take years. To force the debtor to remain in bankruptcy until a final determination of all possible preference actions is made would act as a detriment to both the debtor and its creditors by slowing down the reorganization process. In most of the large chapter 11 cases in this Court, the plan of reorganization and/or liquidation is often confirmed before the debtor and/or a trustee has undertaken a detailed investigation of the potential preference actions. In large Chapter 11 cases there may be hundreds or even thousands of transaction[s] within the 90-day period and considerable time and effort is needed to examine those transactions in light of the numerous defenses provided for in § 547(c). More often than not, it is appropriate to delay that undertaking until after plan confirmation.

279 B.R. at 159; see also *Peltz*, 280 B.R. at 591.

"[The] aim [of section 1123(b)(3)(B)] was to make possible the formulation and consummation of a plan before completion of the investigation and prosecution of causes of action." *Acequia, Inc.* v. *Clinton*, 34 F.3d 800, 808 (CA9 1994)). "Clearly, it is not always possible to complete an investigation of a potential preference action prior to what might otherwise be the appropriate time to seek confirmation." Vines & Teofan, 12 BANKR. DEV. J. at 761. As in ordinary civil litigation, a party to a bankruptcy proceeding may not be able to learn of all potential claims until the process of discovery has begun. Prohibiting debtors from reserving all claims thus creates the injustice of extinguishing claims the debtor *could not* have identified specifically at the time the plan was confirmed.

For this reason, parties to a bankruptcy proceeding cannot use clever drafting to escape the problem created by the Appeals Court's *per se* rule. Even a debtor aware of the rule would know that he might well be unable to identify, before completing an investigation, every claim he possesses

against a creditor. As a result, the debtor's only recourse is to litigate and investigate all claims fully before the bankruptcy court confirms the plan. This is precisely the outcome that Congress enacted Section 1123(b)(3)(B) to avoid.

The Appeals Court's decision thus imposes a hefty burden upon the federal bankruptcy courts. In *every* Chapter 11 case, the debtor will potentially have claims he could pursue against a creditor. The *per se* rule adopted in *Bishay* forces all such debtors to drag out the bankruptcy proceedings – delaying the date that creditors are repaid, that the reorganized debtor can start anew, and that the bankruptcy court can move on to other cases – while they investigate as many potential claims as they can manage to foresee.

II. Certiorari is warranted because the question presented is the subject of an intractable split in the federal and state courts.

"There is much disagreement with regard to the degree of specificity required by section 1123." Vines & Teofan, 12 BANKR. DEV. J. at 757. "The courts are divided on how specific the language of retention and enforcement must be under § 1123(b)(3)(B) to adequately reserve a cause of action for adjudication at a later date." *Cohen*, 279 B.R. at 157; *Peltz*, 280 B.R. at 589. In particular:

> The majority of courts that have examined this issue have held that for this exception [to *res judicata*] to apply, the plan must expressly reserve the right to pursue *that particular claim* post-confirmation and that a blanket reservation allowing for an objection to *any claim* is insufficient.
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> * * *
>
> A minority of courts, however, have held that a plan provision containing a general reservation of "the right to object to claims following confirmation and for extending the time for doing so" is sufficient to overcome the *res judicata* bar.

Tracar v. *Silverman*, 266 B.R. 273, 277-78 (Bankr. E.D.N.Y. 2000) (emphasis in original) (citations omitted) (quoting *In re Weidel*, 208 B.R. at 853).

Courts have specifically staked out three different positions: a *per se* rule enforcing only clauses that reserve specifically identified claims; a middleground approach enforcing a clause reserving all claims so long as the debtor has otherwise notified the creditor of his intention to pursue post-confirmation claims, including by naming the creditor in the reservation clause; and a *per se* rule enforcing all clauses that reserve all claims. Petitioner would have prevailed under either of the latter two rules.

The Massachusetts Appeals Court took the first approach, adopting a *per se* rule against enforcing a general clause: "A blanket reservation that seeks to reserve all causes of action reserves nothing." Pet. App. 4a n.6 (quoting *D&K*, 112 F.3d at 261). The Sixth and Seventh Circuits agree. *D&K*, 112 F.3d at 260-61; *Browning* v. *Levy*, 283 F.3d 761, 774 (CA6 2002); *Micro-Time Mgmt. Sys., Inc.* v. *Allard & Fish, P.C.*, 983 F.2d 1067 (CA6 1993) (Table), 1993 WL 7524 (unpublished disposition), *cert. denied*, 510 U.S. 906 (1993)).[3] Both state and federal courts have followed the *per se* approach of the Sixth and Seventh Circuits. See *Tracar*, 266 B.R. at 277-79; *Rainbow Trust* v. *Moulton Constr., Inc.*, 200 B.R. 785, 788 (Bankr. D. Vt. 1996); *Truesdell* v. *Donaldson, Lufkin & Jenrette Secs. Corp.*, 281 A.D.2d 334, 335 (N.Y. App. Div. 2001).

The Eighth Circuit and the Supreme Courts of Virginia, Alaska, and Louisiana have taken a middleground approach under which Bishay would have been allowed to pursue his

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[3] The Sixth Circuit's decision in *Micro-Time* is "[u]npublished yet increasingly cited" and was relied upon in *D&K*, in *Browning*, and in other cases because "[t]he Sixth Circuit rules place no limitation on citation to unpublished opinions by courts." *D&K*, 112 F.3d at 260 n.2.

claim because Citizens was aware of the claims Bishay intended to assert. This approach characterizes a reservation clause as a tool for ensuring that the creditor is notified of the debtor's intention to bring future claims. The courts taking this view thus require that *either* "the reservation language [must] expressly preserve specific claims *or* * * * the facts and circumstances [must] clearly show that the parties intended to preserve specific claims for later adjudication." *Bill Greever Corp.* v. *Tazewell Nat'l Bank*, 256 Va. 250, 256 (Va. 1998) (emphasis added). See *Harstad* v. *First Am. Bank*, 39 F.3d 898, 902-03 (CA8 1994) ("[T]he creditors are entitled to know if the debtors intend to pursue the preferences in post-confirmation actions," not merely "that the availability of such claims was being investigated."); *Greever*, 256 Va. at 256-57; *Tope* v. *Christianson*, 959 P.2d 1240, 1245-47 (Alaska 1998) ("TEC's reorganization plan and disclosure statement did not reveal its intent to reserve the counterclaim."); *Terrebonne Fuel & Lube, Inc.* v. *Placid Ref. Co.*, 666 So.2d 624, 634-35 (La. 1996) (enforcing a general reservation clause where "the parties and the court were aware that these claims would be asserted later"). *Harstad*, *Greever*, *Tope*, and *Terrebonne* all involved general reservation clauses like the one in *Bishay*. The courts in *Harstad*, *Greever*, and *Tope* ruled that the debtors had failed to preserve their claims because they had not sufficiently supplemented their general reservation clauses with other means of notifying the creditors; whereas the court in *Terrebonne* enforced the general clause because it was so supplemented. Like the debtor in *Terrebonne* and unlike the debtors in *Harstad*, *Greever*, and *Tope*, Bishay informed his creditor in unmistakable terms of the claims he intended to bring in state court after the Chapter 11 plan was confirmed.

A third group of courts has adopted a *per se* rule enforcing general reservation clauses like the one in *Bishay* — a rule under which Bishay would of course have been allowed to pursue his claims. See *Cohen* v. *TIC Fin. Sys.*, 279 B.R. 145, 156-62 (Bankr. D. Del. 2002); *Peltz* v.

Worldnet Corp., 280 B.R. 573, 589-94 (D. Del. 2002); *In re Weidel*, 208 B.R. 848, 852-53 (Bankr. M.D.N.C. 1997); *Envirodyne Indus., Inc.* v. *Conn. Mut. Life Co.*, 174 B.R. 986, 991 (Bankr. N.D. Ill. 1994); see also *Acequia, Inc.* v. *Clinton*, 34 F.3d 800, 807-08 (CA9 1994); *Appletree Square I Ltd. P'ship* v. *O'Connor & Hannan*, 575 N.W.2d 102, 104-05 (Minn. 1998).

Certiorari is accordingly warranted in order to resolve the entrenched three-way conflict regarding whether to give effect to clauses, in Chapter 11 bankruptcy plans, that reserve all claims of the debtor against a creditor.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas C. Goldstein
Amy Howe
John Bronsteen
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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